

No. 12403

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

WILLIAM J. DUBIL, EDWARD J. HUBIK and EARL F.
SHORES,

Appellants,

vs.

RAYFORD CAMP & Co. and RAYFORD CAMP,

Appellees.

APPELLANTS' BRIEF.

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APPELLANTS' BRIEF.

Background.

This action was filed below for patent infringement, state trade-mark infringement, and unfair competition. The Lower Court did not make any Findings nor enter any Judgment with respect to patent infringement, but held the patent in suit invalid. That part of the decision of the Lower Court which relates to the validity of the patent is not appealed from.

The Honorable Charles C. Cavanah, retired United States District Judge from Idaho, sat in the trial of this case. The proceedings prior to and subsequent to the trial of this case were heard by the Honorable Leon R. Yankwich, United States District Judge for the Southern District of California, Central Division.

Points Appealed Upon.

This appeal is taken only upon two points:

1. That the award of \$15,000.00 for attorneys' fees and costs in this case should be reversed, or at least vastly reduced; and
2. That the Lower Court lacked jurisdiction to try the issues of state trade-mark infringement and unfair competition between citizens of the same state.

The Specification of Errors relied upon in this appeal is as follows:

I.

That the Lower Court erred in holding that it had jurisdiction to try and in trying the second, further and additional cause of action set forth in the Complaint in this case.

II.

The Lower Court erred in not granting the defendants' "Motion to Dismiss the Second Count of Plaintiffs' Complaint for Lack of Jurisdiction."

III.

The Lower Court erred in assessing any attorneys' fees whatever in this case.

IV.

The Lower Court erred in paragraph XXXII of the Findings in finding that defendants' attorneys have been required to attend numerous contested motions prior to trial, or that any pre-trial was conducted in this case, and erred in finding that "numerous" depositions and plant inspections requiring their attendance were conducted, and

erred in finding that this action by plaintiffs was unjustifiably filed or prosecuted or was unreasonably prolonged.

V.

The Lower Court erred in paragraph XXXII of the Findings in finding that either Twenty Thousand Dollars (\$20,000.00) or Twelve Thousand Dollars (\$12,000.00) (the Court was apparently undecided as to which sum he wanted to assess) is a reasonable sum for attorneys' fees and costs in this action; that the Lower Court abused its discretion in such finding without any showing whatever as to what a reasonable attorneys' fee would be in this case; and the Lower Court erred in not having the actual costs taxed, as is the practice in the Lower Court, instead of lumping them together with the attorneys' fees without any proof whatever as to what the actual costs were.

VI.

The Lower Court erred in paragraph XV of the Findings in finding that the art pleaded in the present case was not before the Court in *Dubil v. Landau and Levy*, No. 247-B; erred in not finding that the subject matter of two of the four prior patents relied upon here were before the Court in *Dubil v. Landau and Levy*; and erred in not holding that the Court previously held the patent in suit valid in a contested case in its decree against Levy in said case.

VII.

The Lower Court erred in paragraph XIV of the Conclusions, in concluding that the defendant Camp is entitled to recover attorneys' fees and costs in the amount of Fifteen Thousand Dollars (\$15,000.00), or any other amount,

or that Fifteen Thousand Dollars (\$15,000.00) is a reasonable amount for such.

VIII.

The Lower Court erred in paragraph VII of the Judgment, in adjudging that the defendant shall recover attorneys' fees and costs in the sum of Fifteen Thousand Dollars (\$15,000.00), or any other amount. [Tr. pp. 195-7.]

I.

Abuse in This Case?

It is submitted that there has been an abuse of discretion by the Lower Court in this case, in assessing \$15,000 for attorneys' fees and costs!

There are no special circumstances in this case that justify such an award. In fact, the patent in suit [Tr. p. 181] was previously sued upon in the same Lower Court, and, after a trial before a Special Master whose decision was approved by the United States District Court for the Southern District of California, Central Division, the patent here in suit, in such previous case, was declared to be "good and valid in law" [Tr. pp. 166-180].

Therefore, it is submitted that there was "justifiable cause for filing [and] prosecuting this action," since the patent in suit was previously held valid.

As held in *Hall v. Keller*, 81 Fed. Supp. 835, 836 (D. C. La., 1949), where there is "probable cause for the suit," attorneys' fees should be denied.

Since there appeared to be probable cause in the present case, it appears unfair to penalize the present appellants, when they sued upon a patent judicially held to be valid by another Judge sitting in the same Court.

Lower Court Juggled Figures.

It seems clear that Judge Cavanah was not sure what he wanted to assess as attorneys' fees in this case. At first, in his Opinion, he stated that the defendants should recover \$20,000 for attorneys' fees and costs [Tr. p. 106]!

Then Judge Cavanah signed the Findings of Fact and Conclusions of Law in a somewhat confused state. The Findings still say, in the typewritten part, that \$20,000 is "a reasonable sum" for the defendants to receive as attorneys' fees and costs. However, above the \$20,000 is written "\$12,000" [Tr. p. 143, last line]. Judge Cavanah was the only one with authority to interline the \$12,000, and these figures appeared on the Findings when they were returned signed by him [Tr. pp. 149-150].

Since the Conclusions and Judgment assessed \$15,000 for attorneys' fees [Tr. pp. 146 and 148], it appears that Judge Cavanah vacillated among \$20,000, \$12,000 and \$15,000, due to his uncertainty (which is believed to show clearly the lack of any *factual* foundation for any award of attorneys' fees. There should not have been a variation of as much as \$8000 if any proper basis had been laid for assessing attorneys' fees).

No Foundation for Attorneys' Fees.

It is submitted that there is no basis in this case for the unreasonable and unjustifiable attorneys' fees of \$15,000 (or \$20,000 or \$12,000). Paragraph XXXII, which is the only attempt in the Findings of Fact or Conclusions of Law to bolster up the excessive attorneys' fees, is very loosely drawn. That paragraph states that the defendants' attorneys were required to attend in Court on "numerous" separately contested motions prior to the trial [Tr. p.

143]. That is not borne out by the record, unless four times be considered “numerous.” The record shows that prior to the trial the defendants’ counsel were in Court in this case only on the following four occasions:

1. To argue the defendants’ Motion to Dismiss the Second Count of Plaintiffs’ Complaint. This motion was denied; the hearing took less than one hour [Tr. pp. 8, 9 and 115-116].
2. On plaintiffs’ objections to certain of defendants’ 28 interrogatories [Tr. pp. 41 *et seq.*]. The plaintiffs answered 7 interrogatories without objection and objected to 21. Of these 21, the Court held that the plaintiffs did not have to answer $15\frac{2}{3}$ of them and ordered the plaintiffs to answer $5\frac{1}{3}$ of them. This hearing took less than one hour, and, as seen, was considerably more against the defendants than the plaintiffs [Tr. pp. 45-7, 60-2 and 116].
3. On plaintiffs’ Motion to Inspect Defendants’ Plant [Tr. pp. 77-9]. This motion was granted and it took not more than one (1) hour in Court for the hearing [Tr. pp. 79-82 and 116].
4. On plaintiffs’ Motion to Strike paragraph “M” of the Answer to the Amended Complaint [Tr. p. 72]. This hearing likewise took not more than one (1) hour [Tr. p. 116.]

Thus the “numerous” (4) hearings before the trial took less than four hours altogether.

“Several Pretrial Hearings.”

In addition to the above, the Findings of Fact state that defendants' counsel also attended “several pretrial hearings” prior to the trial of this case [Tr. p. 143]. This is entirely in error. No pretrial hearings whatever were held in this case [Tr. p. 114]! The record is absolutely devoid of such; in fact, none was conducted by either of the two Judges who sat at different times in the case [Tr. pp. 158-165]. It is not seen how there can be any dispute but that the Lower Court was entirely in error on this point, which is one of the bases for assessing \$15,000 as attorneys' fees in this case.

“Numerous Depositions.”

The Finding that there were “numerous depositions” is a vague conclusion of the author thereof [Tr. p. 143]. The fact is that there were 9 depositions. However, there were 3 depositions of the defendant Camp and 2 depositions of the plaintiff Shores, so actually the depositions of only six (6) different people were taken, and one of those depositions was taken on interrogatories, at which no counsel was present [Tr. pp. 92 and 115]. All nine (9) depositions took only approximately 8 hours altogether [Tr. p. 115].

“Plant Inspections.”

“Plant inspections” were also mentioned in the Findings [Tr. p. 143] as being a basis for part of the out-sized attorneys' fee. The plant inspections were two. One took one-half day and the other took less than one hour [Tr. pp. 114-5].

Nine Days of Trial.

The less than 4 hours in Court on motions prior to the trial; the 8 oral depositions and the written one, that took no more than 8 hours altogether; the two plant inspections, which respectively took one-half day and less than one hour; the 9 days of trial; and preparation for the motions and trial, is the work of defendants' counsel for which the Lower Court assessed the sum of \$15,000 in attorneys' fees!

This oppressively large attorneys' fee was awarded despite the facts that: (1) The patent in suit is less than a page and half long [Tr. p. 181], so obviously was not very involved; (2) the testimony offered on behalf of the defendants in this case took less than 2½ days to present; and (3) the final arguments on both sides plus the arguments on both sides on defendants' Motion to Dismiss at the conclusion of plaintiffs' testimony, took less than one day [Tr. pp. 90-8]. The other 5½ days were engaged in putting on plaintiffs' case on patent infringement, trademark infringement and unfair competition, which is not believed to be "prolonging" the trial.

As stated in *Dixie Cup Company v. Paper Container Mfg. Company*, 169 F. 2d 645, 651 (C. C. A. 7):

“ . . . Whether either party is entitled to an award of attorney fees under the circumstances of the case, we express no opinion. If the court, however, sees fit to make such allowance, we think the proper exercise of its discretion requires that the amount allowed bear some reasonable relation to the services rendered. . . .”

The Seventh Circuit recently again considered this attorney's fee section very carefully in *Dixie Cup Co. v. Paper Container Mfg. Co.*, 174 F. 2d 834 (C. C. A. 7, June 1949), stating:

“Judicial discretion . . . requires that the court be discreet, just, circumspect and impartial, and that it exercise cautious judgment. The term connotes the opposite of caprice and arbitrary action.” (p. 836)

That paragraph alone is believed to show the fallacy of the enormous attorneys' fee in this case, since it is believed that the award of \$15,000.00 for attorneys' fees is neither “discreet, just, circumspect [or] impartial,” or is the result of “cautious judgment.” That Court continued:

“We believe that to justify a finding of abuse of discretion it is necessary to show that the order complained of was based upon an erroneous conception of the law or *was due to the caprice of the presiding judge or to an action on his part arbitrary in character.*” (p. 837.) (Italics added.)

Applying that to the present case, it is believed that a \$15,000.00 attorneys' fee, not being based upon the facts in this case, is the result of the caprice of the trial judge. It is also believed that his indecision as to whether to assess the sum of \$20,000.00, \$12,000.00 or \$15,000.00 shows his action was arbitrary and without proper foundation in fact.

Moreover, the proof upon which attorneys' fees are based must be *adequate*. See *Aeration Processes, Inc., v. Walter Kidde & Co., Inc.*, 83 U. S. P. Q. 403 (C. C. A. 2,

Nov. 1949). As a corollary to this, the Finding of Fact relative to an attorneys' fee must be *adequate*.

It is believed that \$15,000 as attorneys' fees is not only unreasonable, capricious and unjustifiable, but there is a hint in the Findings that the Lower Court assessed at least part of this sum, if not all of it, as a punitive measure against the plaintiffs, since paragraph XXXII states that the plaintiffs "unreasonably prolonged" the trial [Tr. p. 143]. It is submitted to this Honorable Court that attorneys' fees should not be assessed against a losing party as punishment, but only as compensation in case the action was unjustifiable or brought under special circumstances such as bad faith, frivolous suit, harassment, oppression, etc. The statute (35 U. S. C. A., §70) permits only "reasonable" attorneys' fees which, it is submitted, should be by way of reimbursement in those cases where it would be a gross injustice not to award attorneys' fees.

Bad Precedent.

It is believed that it would be an extremely dangerous precedent and would be a serious deterrent to industrial and commercial advancement and development in our country if the Courts should allow extremely large and penalizing attorneys' fees against patentees who in good faith seek the determination of what they honestly believe to be infringements of their patents, and especially where the validity of the patent had been generally acquiesced in for years, following a judicial holding that the patent is valid, as in this case.

A potential award of attorneys' fees that would bankrupt the ordinary patentee would, in most cases, prevent the ordinary inventor from asserting his legal rights ac-

corded him by his patent, for fear of being forced to bear the burden of an extreme penalty in the form of what to him would be an enormous attorneys' fee, in the event of his failure to prevail in the case. If such becomes the law of this Circuit, it would seem that patent litigation would become a "rich man's privilege."

It is respectfully submitted that attorneys' fees should be allowed only in aggravated cases, similar to the practice of the courts in exercising their discretionary powers to treble damages in a patent case where the infringement of a defendant is found to be wilful and deliberate. Even despite this power, it very rarely happens that treble damages are awarded, even in extreme cases.

If back-breaking attorneys' fees are awarded in patent cases, the appearance of an infringer would leave a patentee to an election of one of two alternatives: (1) to permit the infringement to continue with the resulting detriment to his business, which naturally tends to decrease and/or eliminate all profit; or, (2) to assert his rights based upon his patent in a court of law, with a possible heavy penalty if the patent which he thought was valid (because it was issued to him by the United States Patent Office) is finally held to be invalid.

It is submitted that, apart from the rights of the parties to this litigation, this Judgment, if allowed to stand, would be a very bad precedent. Defendants in patent cases are very frequently corporations (as this Honorable Court knows), and often large corporations. On the other hand, inventors are often relatively poor individuals. Therefore, this case, if not reversed as to the attorneys' fees, could very well (and already has, although that is not in the record) discourage individuals from asserting their

rights against infringers for fear of being assessed excessive attorneys' fees if they should not prevail.

Large corporations will sue upon patents and flagrantly infringe them, despite tremendous attorneys' fees (and the higher the tax bracket, the less the corporation would be discouraged, because the Government would pay most of it). Whereas, on the other hand, a poor, struggling inventor does not dare risk not only losing his patent, but also face the hardship of having to pay attorneys' fees in oppressive proportions. It is thought that the entire effect of the Judgment of the Lower Court in this case is wrong. It tends to discourage Yankee ingenuity—not encourage it.

Attorneys on Both Sides Appear to Agree.

The attorneys for both the appellants and the appellees appear to agree that attorneys' fees should not be allowed except under special circumstances. This lawsuit presents the very rare situation of having briefs written by counsel on *both* sides agreeing on the same point. The following quotations are from the brief of Harris, Kiech, Foster and Harris, Esqs., counsel for the appellees here, which was filed in another case before the present suit was commenced:

(a) "It was not the purpose of the amended Statute, 35 U. S. C. A. §70, to award attorneys fees to the prevailing defendant in a patent infringement suit except under special circumstances resulting in a gross injustice."

(b) "The award of attorneys' fees to the prevailing party in a patent infringement suit in the absence of special circumstances is contrary to well-established precedents."

(c) "It is an abuse of the Trial Court's discretion to award attorney's fees to a prevailing defendant sued for infringement of Letters Patent unless there is some evidence of special circumstances justifying such award."

Said entire brief appears at pages 117-125 of the Transcript in this case. Since it was a brief *amicus curiae* (and not as employed counsel), and since it was done at the expense of appellees' counsel, it is believed that it can be assumed that that brief expresses the personal views of appellees' counsel as to what the law is generally, and what it should be in this Circuit.

Without repeating here the entire brief that appears at pages 117-125 of the Transcript, it is incorporated herein, and it is respectfully asked that this Honorable Court read said brief as being a good and careful consideration of the law in this connection.

No Special Circumstances.

From the foregoing, it is submitted that there are no special circumstances in this case which would call for the assessing of attorneys' fees, and no special circumstances were relied upon by the Lower Court in its Opinion, Findings, Conclusions or Judgment.

Attorneys' fees in patent cases were not intended to be the ordinary thing. The provision was made general merely to prevent gross injustice. See the Senate Report 1503 of the 79th Congress, Second Session:

"By the second amendment, the provision relating to attorney's fees is made discretionary with the court. *It is not contemplated that the recovery of attorney's fees will become an ordinary thing in patent suits, but*

the discretion given the court in this respect, in addition to the present discretion to award triple damages, will discourage infringement of a patent by anyone thinking that all he would be required to pay if he loses the suit would be royalty. The provision is also made general so as to enable the court *to prevent gross injustice to an alleged infringer.*" (Italics added.)

The above quotation is given in many of the cases on attorneys' fees, including the *amicus curiae* brief of Harris, Kiech, Foster and Harris, Esqs., appellees' counsel [Tr. pp. 118-9]. Apparently, the importance of the above Senate Report is not denied.

It is urged that the present case is an ordinary patent infringement case with no gross injustice to the appellees-defendants.

The following statement by Harris, Kiech, Foster and Harris, appellees' counsel, in their said brief *amicus curiae* would appear particularly apt:

"It is apparent that a Trial Court in awarding attorneys' fees in the absence of special circumstances, fails to construe the new amendment in accordance with its express purpose and intent and fails to look to the history of the amendment, the judicial interpretation of analogous statutes, and the decisions of other Courts in determining principles and proper guidance." [Tr. pp. 124-5.]

Also showing that special circumstances are necessary before an award of attorneys' fees should be made in favor of a prevailing defendant, see the case of *National Brass Co. v. Michigan Hardware Co.*, 75 Fed. Supp. 140 (D. C. Mich. 1948), cited and quoted from in the brief *amicus*

curiae of appellees' counsel [Tr. p. 124]. That Court stated:

“In construing the amendment relating to the award of attorney’s fees in patent cases, the court may well consider the judicial construction placed upon a substantially similar statute relating to attorney’s fees in copyright cases. . . .

“A comparison of these two statutes clearly shows that while the language is not identical, they are similar in effect and legal import. . . .

“Examination of the cases arising under the copyright statute indicates that in some instances attorney’s fees have been awarded and in other instances have been denied. However, from a reading of these cases one may extract the general principle that attorney’s fees are awarded only where dictated by equity and good conscience. . . . They should not be awarded unless equity considerations exist which call for the penalization of the losing party.

“The defendant in the present case cites certain decisions in support of its motion for allowance of attorney’s fees. An examination of these cases will show that for the most part they involved an award of attorney’s fees to plaintiffs in suits in which the defendants were found guilty of infringement (see *Cory v. Physical Culture Hotel, Inc.*, 2 Cir., 88 F. 2d 411; *Sheldon v. Moredall Realty Corporation*, D. C., 29 F. Supp. 729) or involved suits in which the court found that the actions were ‘filed without justification, either in law or in fact’ (see *Corcoran v. Montgomery Ward & Co., Inc.*, D. C., 32 F. Supp. 421, 422) or in which the plaintiff’s claim of infringement was ‘quite fantastic’ (see *Rose v. Connelly*, D. C., 38 F. Supp. 54, 55).

“A careful review of the pleadings, testimony, and circumstances in the present case clearly indicates that it was the usual and ordinary suit for infringement of patent and that it was instituted in good faith and vigorously prosecuted. The court finds no evidence indicating bad faith or dilatory, harassing or vexatious tactics on the part of the plaintiff. There appear to be no special circumstances and no equitable considerations which would justify an award of attorney’s fees to the defendant. . . .”

The present case also is the usual and ordinary suit for infringement of patent and was instituted in good faith and vigorously prosecuted. There was no finding of bad faith or dilatory, harassing or vexatious tactics by the plaintiffs here.

A leading case along this line is *Lincoln Electric Co. v. Linde Air Products Co.*, 74 Fed. Supp. 293 (D. C., N. D. Ohio, 1947). This case was cited and quoted from in the Harris, Kiech, Foster and Harris said brief *amicus curiae* [Tr. pp. 123-4]. The *Lincoln Electric* case is very persuasive authority in favor of appellants. Note the following from that case:

“This cause came on for hearing on the motion of the defendant for an allowance of attorney’s fees, a proposed order and judgment, and the objections thereto. The request for attorney’s fees is based on a recent enactment of Congress, 35 U. S. C. A. §70. The statute was passed after the present action had been instituted, but it would be applicable to the present case if the circumstances warranted the allowance requested. It is apparent from the wording of the statute and its history that an award of attorney’s fees should not be made in an ordinary case. The court is invested with discretionary power where it is

necessary to prevent gross injustice. The case at bar presents a situation which is not unusual in patent matters. This court finds no special circumstances of gross injustice. . . . This court does not consider that the action by the plaintiff was absolutely unwarranted or unreasonable. Since the award asked by the defendant is contrary to long established practice, a clear showing of the conditions indicated in the statute must be made to entitle the applicant to the relief sought. The circumstances and conditions surrounding the parties in this litigation do not warrant an award of attorney's fees to the prevailing party. The motion is therefore overruled."

In *Union Nat. Bank of Youngstown v. Superior Steel Corp.*, 9 F. R. D. 117, 121 (D. C., W. D. Pa., 1949), the Court stated with reference to the attorney's fee provision of 35 U. S. C. A. §70:

"With reference to this power, however, the Congressional history of the amendment indicates that it was to be used *sparingly*." Citing the Senate Report No. 1503, *supra*, to the effect that it was contemplated that attorney's fees would not become "'an ordinary thing in patent suits'" and that it was made general "'to prevent a *gross injustice*.'" (Italics added.)

Since the patents in that case were held valid, the Pennsylvania Court, *supra*, held (p. 121):

". . . it would be difficult indeed to assert that plaintiff was not justified in bringing defendant into court."

In the instant case, it is submitted that the plaintiffs were “justified” in bringing the defendants into court since the patent in suit was previously held valid by the same Court.

Another strong case *re* not allowing attorneys’ fees in the ordinary, normal patent case is *Juniper Mills, Inc. v. J. W. Landenberger & Co.*, 76 U. S. P. Q. 300 (D. C. Pa., 1948), in which the Court said:

“It has never been supposed that counsel fees are normally allowable to a successful party as part of the costs. In most, if not all, cases where statutory authority has been given to the court to allow them, the intention has been to make the allowance something in the nature of a penalty for some sort of unfair, oppressive or fraudulent conduct on the part of the losing party. I think this was the reason why the 1946 amendment made the award discretionary with the court and I believe the court should not award an attorney’s fee as costs in an ordinary normal patent case.”

Since the present case is an ordinary, normal one, with no finding of gross injustice and with nothing unfair, oppressive or fraudulent, the phenomenally large attorneys’ fee is believed to show a clear abuse of the Lower Court’s discretion. Under such circumstances, this Court has the right to reverse the Lower Court’s decision as to attorneys’ fees. See *Blanc v. Spartan Tool Co.*, 168 F. 2d 296, 300 (C. C. A. 7).

No Attorney Fees for Trade-Mark and Unfair Competition Matters.

A substantial part of the trial of this case was occupied with trade-mark and unfair competition issues. 35 U. S. C. A. §70 states in part that, "The court may in its discretion award reasonable attorneys' fees to the prevailing party upon the entry of judgment in any *patent* case." (Italics added.) Attorneys' fees are not allowed for trade-mark infringement or unfair competition matters. See *Gold Dust Corp. v. Hoffenberg*, 87 F. 2d 451 (C. C. A. 2). However, no effort was made by the Lower Court in its Findings in this case, to separate the patent portion of this case from the remainder of it, for assessing attorneys' fees. This alone is believed to be reversible error. Assessing attorneys' fees in patent cases is of course in derogation of the common law, so should be strictly construed. (Appellees' counsel agree with this [Tr. p. 121]), and no attorneys' fees should be levied for any part of a trial involving trade-mark and unfair competition matters.

Although it is not believed to be a safe criterion because of the widely different fees that are charged by different attorneys for the same identical type of work (*e. g.*, the plaintiffs here should not be charged here for the *three* attorneys who sat at the defendants' table throughout most of the trial [see Tr. pp. 84-98]), neither the Findings, the Conclusions or the Judgment was in any way based upon what the defendants were actually charged for or had actually paid for attorneys' fees. The Lower Court Judge simply picked three figures out of the air (\$20,000, \$12,000 and \$15,000) and finally settled upon one of them. It is submitted that such guesswork should not be the proper basis for levying attorneys' fees. In *Activated Sludge v. Sanitary District of Chicago*, 64 Fed.

Supp. 25, 36 (affirmed 157 F. 2d 517, cert. den. 330 U. S. 834, 91 L. Ed. 1281, 67 S. Ct. 970), the Court refused to consider “the amount of fees of counsel.”

What Are “Reasonable” Attorneys’ Fees?

The appellants’ very first point is that there should not be any award of attorneys’ fees in this case whatever, since there are no special circumstances here. This suit is not believed to be a frivolous one, since it is based upon a patent that the same Lower Court had already declared good and valid in law. Moreover, this suit was not believed to have been brought because of any gross injustice—no such basis appears in the Lower Court’s Findings, Conclusions or Judgment in this case.

The appellants’ second point is that even if attorneys’ fees are assessed, the sum of \$15,000 is entirely out of line. One rule of thumb is to assess \$100 per day for court work and \$100 per day for a corresponding amount of office work and preliminary matters. For instance, for a nine-day trial, if it were a case involving special circumstances, and if approximately one-half the time was spent on patent matters, the fee would be \$450 for the four and one-half ($4\frac{1}{2}$) days of court work on the patent part only of the case, and \$450 for the preliminary matters and preparation for the patent part of the trial, or a total of \$900 for $4\frac{1}{2}$ days of trial and $4\frac{1}{2}$ days of preparation devoted to patent matters (exclusive of trade-mark and unfair competition matters). That rule of thumb would seem to be more in line with what would be a “reasonable” attorney fee—which is the only attorney fee permitted by the Statute. The Statute does not permit a Lower Court Judge to assess an unreasonable attorney fee as a punitive measure for “prolonging” a trial.

The sum of \$15,000.00 is over \$1600.00 per day for every day in Court. Even considering the normal preliminary motions in this case, and normal preparation for trial, this is a very excessive amount of attorneys' fees.

It is submitted that the award of attorneys' fees should be reversed on the ground that the Findings do not show special circumstances warranting any attorneys' fees in this case, or at the very least, send the case back to the Lower Court to determine what a *reasonable* attorneys' fee would be, in view of the fact that only part of the case was on patent infringement or patent validity, and in view of the fact that costs were included.

Costs Included.

It will be noted that the Lower Court assessed the \$15,000 (originally \$20,000) for both "costs and attorneys' fees" [Tr. p. 146]. However, no cost bill was ever filed by the defendants [Tr. pp. 158-165]. A bill of costs must be filed and the costs taxed in the proper manner, in accordance with Section 1920 of the Judicial Code.

Moreover, a bill of costs must be verified that it is "correct and has been necessarily incurred in the case." No such affidavit has ever been filed in this case, as required by Section 1924 of the Judicial Code.

It is submitted that this commingling of attorneys' fees and court costs by the Lower Court, without any bill of costs, verified or unverified, ever having been filed, is alone sufficient basis for reversing the fixing of \$15,000 for attorneys' fees and costs in this case. since it is obviously very irregular and not at all in keeping with the practice in this Circuit or the Statute under which the Lower Court obtained its right to assess costs.

Out of Line With Established Precedent.

The assessing of such an excessive attorneys' fee as \$15,000 is out of line with the custom and established precedent in the District Court of the Southern District of California, Central Division. This Honorable Court can, of course, take judicial notice of the precedents which have come up from that Division of the District Court. No other case in the history of that Division has ever approached such an out-sized attorneys' fee.

A careful analysis of the prior decisions of that Court was made in an endeavor to get all the patent cases that had been decided in the District Court of the Southern District of California, Central Division, after August 1, 1946 (when 35 U. S. C. A. §70, relating to awarding reasonable attorney fees, went into effect). Nineteen such cases were found. In eleven of them no attorneys' fees whatever were entered, which is more than half of them.

In four of the patent cases by that District, \$500 was awarded as attorneys' fees. It was in one of the \$500 cases (*Helbrush, et al. v. Finkle*) in which the appellees' counsel here, Harris, Kiech, Foster and Harris, Esqs., filed their brief *amicus curiae*, objecting to \$500 as an attorney fee! In the other four cases, the attorneys' fees awarded ran from \$800 to \$3300 [Tr. pp. 109-114].

It is submitted: An attorneys' fee assessed by an out-of-the-state Judge, which is almost five (5) times as great as the highest ever levied by any of the seven resident Judges of the Southern District of California, who rendered nineteen decisions in patent cases from August 1, 1946 to the filing of this appeal, is entirely out of line with the ESTABLISHED LOCAL CUSTOM.

In awarding attorneys' fees, "the Trial Court must act in conformity with established precedent," stated Harris, Kiech, Foster and Harris, appellees' counsel, in their said

brief *amicus curiae*, citing *Bowles v. Quon*, 154 F. 2d 72, 73 (C. C. A. 9, 1946) [Tr. p. 118].

In *Faulkner v. Gibbs*, 170 F. 2d 34 (C. C. A. 9, 1948), attorneys' fees of \$500 were affirmed by this Honorable Court as being a reasonable amount.

Since counsel on both sides seem to agree that attorneys' fees must conform to established precedent, and clearly \$15,000 does not conform to established precedent in the District Court whence this case came, it is submitted that on that ground alone, the award of attorneys' fees should be reversed.

Discretion Must Have Basis.

Although 35 U. S. C. A. §70 permits the Court "in its discretion" to award attorneys' fees, that does not mean the Lower Court can pick a figure out of the air with no basis whatever. It does not mean that the Lower Court can employ guesswork. It does not mean that the Lower Court can assess unreasonable attorneys' fees. The discretion must have a basis. See *Hall v. Keller, supra*, in which the Court stated that reasons must be given for the Court's discretion when attorneys' fees are awarded, in the following words:

"For one party litigant to be cast for the attorney's fees of the other party litigant is not of the ordinary. Generally there is a statute; the provision is either mandatory or discretionary.

"In the instant case *it is discretionary. Therefore, the court should and must give reasons.*" (Italics added.)

It is urged that adequate reasons have not been given in this case to show special circumstances requiring the award of attorneys' fees. This is an ordinary patent infringement case where no gross injustice is involved.

II.

Court Had No Jurisdiction of Trade-Mark
and Unfair Competition Matters.

The second and last point in this brief is that the Lower Court had no jurisdiction of the infringement of the state-registered trade-mark or the unfair competition matter in this case. The fact that the Lower Court had jurisdiction of the patent matter is admitted and is not appealed from. However, the patent in suit is merely a method or process patent [Tr. p. 181] and it would be infringed only by carrying out the method or process; that is, by freezing and thawing fresh meat in the manner described in the patent and then slicing it into very thin slices. That is all. The sale of such thin slices of fresh meat would *not* be an infringement upon the patent in suit. Therefore, the sale of the thin sliced fresh meat under the state-registered trade-mark or in unfair competition would not be related to, or be part of, the same transaction as the carrying out of the method or process, since no sale whatever is involved in infringement of the method or process patent.

The attorneys in this case have substantially reversed their positions on this point. The undersigned urged the jurisdiction below, and the appellees' counsel argued that the Lower Court did not have jurisdiction of the state-registered trade-mark or unfair competition matter because the patent in suit is a method or process patent. As to the second count in the Complaint, relating to the state trade-mark and unfair competition matter, counsel on the other side stated below :

“In the second count an entirely different right is alleged to be invaded, namely, the right to exclusive

use of the trade-mark and freedom from unfair competition in the sale of the meat product. The sale of the meat by defendants gives rise to one cause of action under the second count; the manufacture or preparation of the meat gives rise to another cause of action under the first count. Two different acts on defendants' part are required, namely, manufacture of meat by the patented process, and sale of meat unfairly or bearing an infringing label. Two separate acts; two separate rights invaded; two separate causes of action resulting." [Tr. p. 209.]

It has long been held that a method or process patent is not infringed by the sale of an article made by the process. See *Merrill v. Yeomans*, 94 U. S. 568, 24 L. Ed. 235:

“. . . If, however, appellant's patent is only for the mode of treating these oils invented and described by him, in other words, for his new process of making this new article of hydrocarbon oil, then it is clear the defendants have not infringed the patent, because they never used that process or any other, for they manufactured none of the oils which they bought and sold."

See also *Welsbach Light Co. v. Union Incandescent Light Co.*, 101 Fed. 131 (C. C. A. 2), in which the Court said:

"If it was a patent for a process, it would not be infringed by selling the product."

The Second Circuit recently again affirmed this old and well known rule in *Foster D. Snell v. Potters, et al.*, 88 F.

2d 611 (C. C. A. 2, 1937), wherein the Court said (p. 612):

“A mere sale of the product of the process does not constitute an infringement of a process patent.”

All the above cases, and three others, were cited to the same effect by the counsel for the appellees [Tr. pp. 208-9]. It cannot be successfully disputed but that that is the law today.

If the sale of an article made by a patented process is not an infringement of the patent, then it is submitted the sale of that article under any particular trade-mark, and especially a state-registered trade-mark, or any unfair competition connected solely with the sale of the article, would not be part of the same transaction or be related to the Federal question of patent infringement, and, therefore, the second count should have been dismissed by the Lower Court as not cognizable in a Federal Court.

No Jurisdiction of Trade-Mark and Unfair Competition.

State Registered Trade-Mark. It should be borne in mind that the trade-mark involved in this case is not a Federally registered mark, but is solely based upon a state-registered trade-mark, to wit, a California registration of the mark “Chip Steak.”

No Diversity of Citizenship. There is no diversity of citizenship in this case and no allegation that the amount in controversy amounts to \$3,000, exclusive of interest and costs.

New Federal Judicial Code.

The new Federal Judicial Code, Section 1338 (b), states that a claim of unfair competition can be joined with a "substantial and related" claim under the Copyright, Patent or Trade-Mark Laws. Due to the present controversy being between citizens of the same State, the present state-registered trade-mark and unfair competition matters would have to be "related" to the patent infringement in order for the Lower Court to have original jurisdiction thereof. However, since the sale of the product of a patented process is not an infringement of that patent, such sale is a step away from the patent infringement. Certainly questions connected with the state-registered trade-mark under which such product is sold, or unfair competition in connection with such sales, would be a second step away from the patent infringement. Therefore, it is submitted that questions connected with infringement of a state-registered trade-mark and unfair competition between citizens of the same State are not "related" to infringement of a process or method patent, but are two steps removed from it.

The reviser's notes of the Judicial Code are to the effect that Section 1338 (b) enacts into statutory authority, *Hurn v. Oursler*, 289 U. S. 238, 77 L. Ed. 1148 (1933), the leading case along this line. Referring to Section 1338 (b), the reviser stated:

" . . . While this is the rule under Federal decisions, this section did enact it as statutory authority. The problem is discussed at length in *Hurn v. Oursler* (1933, 53 S. Ct. 586, 289 U. S. 238, 77 L. Ed. 1148) and in *Musher Foundation v. Alba Trading Co.* (C. C. A. 1942, 127 F. 2d 9) (majority and dissenting opinions)."

Since *Hurn v. Oursler, supra*, is clearly the law, some study of that case seems in order. There were different causes of action alleged in the complaint in that case. One was for infringement of a copyrighted play and unfair competition directly connected therewith. The second cause of action was for uncopyrighted additions thereto and unfair competition with respect to such uncopyrighted parts. The Supreme Court held that "two separate and distinct causes of action resulted, one arising under a law of the United States and the other arising under general law" (p. 248). In announcing a rule to be followed in these two types of cases, the Court stated (pp. 245-6):

"But the rule does not go so far as to permit a federal court to assume jurisdiction of a separate and distinct non-federal cause of action because it is joined in the same complaint with a federal cause of action. The distinction to be observed is between a case where two distinct grounds in support of a single cause of action are alleged, one only of which presents a federal question, and a case where two separate and distinct causes of action are alleged, one only of which is federal in character. In the former, where the federal question averred is not plainly wanting in substance, the federal court, even though the federal ground be not established, may nevertheless retain and dispose of the case upon the non-federal *ground*; in the latter it may not do so upon the non-federal *cause of action*." (Italics in original.)

In the present case, since the sale of the product of a patented process is not an infringement upon a patent on the process, infringement of the state-registered trademark and unfair competition between citizens of the same State are "separate and distinct non-federal" matters.

They are not distinct grounds in support of the same cause of action, but are entirely separate and distinct causes of action.

In conclusion, the Supreme Court said (p. 248):

“. . . It is hardly necessary to say that a federal court is without the judicial power to entertain a cause of action not within its jurisdiction, merely because that cause of action has mistakenly been joined in the complaint with another which is within the jurisdiction.”

As also stated on the same page by the Supreme Court, a matter that is “entirely outside the Federal Jurisdiction” is “subject to dismissal at any stage of the case.” Moreover, as stated in Rule 12(h)(2) of the Rules of Civil Procedure, “whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.” Thus the present attack on the jurisdiction of the Lower Court in this case (which has in fact been continuous throughout this case) is believed well taken at this point.

In *Musher Foundation v. Alba Trading Co.*, (C. C. A. 2) 127 F. 2d 9, 10, the majority of the Court held that to a cause of action for infringement of patents on the process of infusing oil and on the products, a plaintiff could not join a second cause of action alleging unfair competition as to the use of the word “Infused” in the sale of said oil.

Circuit Judge Augustus N. Hand delivered the majority opinion in the *Musher* case. He interpreted the *Hurn v. Oursler* case to mean that a non-federal claim might be joined with a federal claim, “if the non-federal count differed from the federal count only because it asserted a

different ground of recovery upon substantially the same state of facts” (p. 10). The Second Circuit majority held that there was no “substantial identity” of the two counts in that case since:

“Proof of infringement of the patents would require no evidence of the use of the word ‘infusion’ and proof of the similarity of complainant’s and defendant’s containers would not establish infringement of the patents. The two counts do not merely allege different grounds of recovery founded upon substantially the same facts, but rather set forth causes of action which under the doctrine of *Hurn v. Oursler* and *Armstrong Paint and Varnish Works vs. Nu-Enamel Corp.*, are separate and cannot be joined, since one is federal and the other non-federal.”

Certainly in the instant case, proof of infringement of the process or method patent had nothing whatever to do with sale of the product of the patented process, and still less to do with the name of “Camp Steak” [Tr. pp. 185 and 187] under which the defendants sold their steaks. Conversely, evidence of the similarity of the two labels of the parties hereto would not in any way prove appropriation by the defendants of the process or method covered in the patent in suit. They are an entirely different state of facts and entirely different causes of action.

The Supplemental Transcript of Record in this case (a separate volume of pages 203-212) is completely made up of the appellee’s Points and Authorities in favor of dismissing the second count of the Complaint. Without repeating same at this point, reference is made to it and it is incorporated herein.

Breach of Confidence Is Non-Federal.

Paragraph X of the Amended Complaint [Tr. pp. 69-70] alleges a breach of confidence by the defendant Camp. The allegations are that Camp had been a salesman for the plaintiff Shores, that the route was owned by the plaintiff Shores, that the list of customers was the property of the same plaintiff, but that after his said employment terminated, the said defendant wrongly solicited the customers included in said list and had induced such customers to buy defendant's steaks instead of the plaintiff Shores'.

Under the doctrine of *French Renovating Co. v. Ray Renovating Co.*, (C. C. A. 6, 1948) 170 F. 2d 945, the above allegations would be non-federal and not joinable with a federal matter. That case, like this, had no diversity of citizenship. The plaintiff there alleged patent and copyright infringement, both of which were admittedly federal matters. Then the plaintiff in that case alleged "breach of contract and breach of trust." The breach of trust alleged was that the defendant had agreed not to divulge certain formulae and/or processes but had violated that covenant. That Court said (p. 947):

"The District Court . . . as an original proposition it has no jurisdiction over suits for breach of contract or breach of trust where there is, as here, a lack of diversity of citizenship and of an allegation that the value of the relief sought is in excess of \$3000.00, exclusive of interest and costs. Title 28 U. S. C. A. Ch. 2, Sec. 41, par. (1). Such suits are non-federal in their nature and the District Court does not acquire jurisdiction over them merely because they are joined in the complaint with other causes of action which are within its jurisdiction. *Hurn v. Oursler*, 289 U. S. 238, 248, 53 S. Ct. 586, 77 L. Ed. 1148.

“Before the District Court in such a case may accept jurisdiction of such non-federal causes of action, it must appear that both federal and non-federal causes rest upon substantially identical facts. *Hurn v. Oursler*, *supra*, 289 U. S. at page 246, 53 S. Ct. at pages 589, 590, 77 L. Ed. 1148. It is the duty of plaintiff, as always, to establish jurisdiction and we cannot say that it has successfully carried this burden. Plaintiff’s non-federal claims are entirely independent of its federal claims and it does not appear with any appreciable degree of certainty that the facts necessary to support them would also support the federal claims.”

Riedly v. Hudson Motor Car Co., 82 Fed. Supp. 8, 12 (D. C. Ky. 1949), quotes a substantial part of the above quotation from the *French Renovating* case, and holds that a cause of action based upon implied contract may not be included in a federal case any more than a contract or breach of trust matter.

The late Judge O’Connor of the District Court, Southern District of California, held to a similar effect in *Gate-Way v. Hillgren*, 82 Fed. Supp. 546 (1949). That case was brought upon an alleged breach of an assignment of a patent, the patent being brought in collaterally. Judge O’Connor with approval quoted the following from *Couch Pats. Co. v. Berman*, 137 App. Div. 297, 121 N. Y. Supp. 978:

“‘One cannot join a cause of action involving federal jurisdiction, with one in which the court has no jurisdiction in the absence of diversity of citizenship.’” (Citing four cases and a text.)

“ ‘ . . . A suit of which the court would have jurisdiction because of the nature of the cause of action cannot be used as the means to bring into the equitable jurisdiction of this court a cause of action between the parties over which the court could not have jurisdiction unless diversity of citizenship of the parties gave the United States Courts generally jurisdiction over the case.’ *Vose v. Roebuch Weather Strip Co.*, D. C., 210 F. 687, 688.

“ ‘We therefore hold that so much of the bill as charges the defendants with contributory infringement of the plaintiff’s letters patent, and seeks relief on that ground, presents a case arising under the patent laws of which the district court should have taken jurisdiction.

“ ‘But the other portions of the bill stand upon a different footing. The causes of action which they present—those not founded upon an unauthorized making, using, or selling of devices embodying the inventions of the plaintiff’s patents, but resting only upon a breach of contractual obligations—do not arise under the patent laws.’ ”

Thus, in accordance with *Hurn v. Oursler*, *supra*, Section 1338 (b) of the new Federal Judicial Code, Circuit Justice Augustus Hand in the *Musher* case, *supra*, the Sixth Circuit in the *French Renovating* case, *supra*, and the late Judge O’Connor, the Lower Court should have granted the Motion to Dismiss the Second Count of Plaintiffs’ Complaint for Lack of Jurisdiction.

Conclusion re Attorneys' Fees.*

(a) The attorneys on both sides agree that attorneys' fees should not be assessed in a patent case unless there are special circumstances, *e. g.*, bad faith, harassment, oppression, a frivolous suit, or the like. It is submitted that there are no special circumstances in this case, since the patent here sued upon was previously held good and valid in law in a litigated case, by this very Lower Court. Thus there was just cause for believing that the patent was valid as to the present appellees also. Therefore, it is believed that there was "justifiable cause for filing [and] prosecuting this action," and that no attorneys' fee whatever should have been levied in this case.

(b) The Lower Court was in error in saying that there were "several pretrial hearings," since no pretrial whatever was held in this case. Moreover, the "numerous" contested motions (four matters, to be exact) were mostly decided in favor of the appellants and not the appellees. The "numerous depositions" took eight hours or less. The "plant inspections" took one-half day for one and one hour for the other. These, together with the nine days of trial, it is submitted, do not lay a foundation for attorneys' fees of the magnitude of \$15,000, even if reasonable attorneys' fees were awarded.

(c) The award of \$15,000 being for both costs and attorneys' fees, should be set aside, since it is not shown how much was for costs. If any part of the \$15,000 is for costs, it should be reversed on that ground alone, since no verified bill of costs was filed, as required by Sections 1920 and 1924 of the Judicial Code.

*The next preceding matter states the Conclusion *re* the jurisdiction of the second count of the Complaint.

(d) Since the attorneys' fee Statute is in derogation of the common law, it should be strictly construed as applying to patent matters only, and not be applied to the trademark and unfair competition parts of this case, since attorneys' fees have never been allowed in such cases.

(e) The sum of \$15,000, awarded by the out-of-state Judge who tried this case, is entirely out of line in a District where the resident judges in the *majority* of cases, assessed no attorneys' fees whatever; in half of those cases where attorneys' fees were assessed, the local judges have levied only \$500 (and even that was objected to by appellees' counsel, in their said brief *amicus curiae*); and the largest attorneys' fees assessed in the District from which this case comes, only amounted to \$800 to \$3300. Therefore, the present case is clearly out of line with local custom.

(f) The Statute says that assessing any attorneys' fees at all lies within the "discretion" of the judge. This not only means sound discretion, and that it must be "reasonable," but there must be proper basis for any attorneys' fee of the proportions of \$15,000!

(g) It is believed that on the first ground appealed upon (oppressiveness and unreasonableness of the attorneys' fee), this Honorable Court should (i) reverse the matter of attorneys' fees on the ground that no special circumstances are shown in this case, and so no attorneys' fees should be assessed; or, in any event, (ii) send this case back to the Lower Court to determine what a *reasonable* attorneys' fee would be, in the spirit of equitable fairness to the appellants as well as to the appellees, and not use the attorneys' fee statute as punishment for allegedly "prolonging" the trial.

The appellants in this case are unable to bear the burden of paying the attorneys' fees awarded in this case without disastrous or near disastrous results. The three appellants in this action are typical of ordinary patentees and ordinary licensee. Dubil has been a small town builder with a modest income. Hubik is a butcher in his own small meat market. Those two are the patentees. Shores operates his own meat business as an individual. He is the licensee. All three were acting in good faith and relied upon the patent in suit and upon the recognition by others of its validity, over a number of years, following the previous holding by the Lower Court that this patent was valid.

It is believed that the appellants have shown their good faith in this case so that in an humble spirit they approach this Honorable Court with the respectful plea that they should not be punished for their honest opinion by being assessed what is to them an enormous and oppressive amount of attorneys' fees.

Respectfully yours,

WILLIAM J. DUBIL,
EDWARD J. HUBIK and
EARL F. SHORES,

By C. G. STRATTON.

Attorney for Appellants.